

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 Will Henry Harlan,

5 Petitioner

6 v.

7 Brian Williams, et al.,

8 Respondents
9

2:15-cv-00799-JAD-PAL

Order Granting in Part and Denying in
Part Respondents' Motion to Dismiss

[ECF No. 7]

10 Pro se Nevada state-prison inmate Will Henry Harlan brings this § 2254 petition to challenge
11 his second-degree murder conviction resulting from a guilty plea.¹ Respondents move to dismiss,
12 arguing that Harlan's claims are either unexhausted, procedurally barred, or not cognizable on
13 federal habeas review.² I agree that the bulk of Harlan's claims are unexhausted, so I grant
14 respondents' motion in part and deny it in part and give Harlan until October 29, 2016, to notify the
15 court how he wishes to proceed with this action.

16 **Background**

17 **A. Harlan's state-court conviction and sentence**

18 In July 2011, the state of Nevada charged Harlan in the Las Vegas Township Justice Court
19 with (1) open murder with use of a deadly weapon, (2) robbery with use of a deadly weapon, (3)
20 attempted murder with use of a deadly weapon, (4) battery with use of a deadly weapon resulting in
21 substantial bodily harm, (5) mayhem with use of a deadly weapon, and (6) possession of a firearm by
22 an ex-felon.³ The charges stemmed from the shooting death of Manuel Phillip Rios three months
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26 ¹ ECF No. 5.

27 ² ECF No. 7.

28 ³ ECF No. 8-13.

1 earlier.⁴

2 After a preliminary hearing, the justice of the peace reduced the open-murder charge to
3 second-degree murder, struck the robbery count,⁵ and bound Harlan over to the Eighth Judicial
4 District Court on the remaining counts.⁶ The state duly filed an information charging Harlan with
5 these offenses⁷ and then moved to amend the information, arguing that the justice of the peace
6 improperly struck the open-murder and robbery charges.⁸ The state district court granted the
7 motion,⁹ and the state filed an amended information changing the second-degree-murder count to
8 open murder and adding a robbery count.¹⁰ Harlan responded with a pre-trial writ, arguing that there
9 was insufficient evidence to bind him over on these counts and that the battery and mayhem counts
10 were duplicative and redundant.¹¹

11 After the state district court denied Harlan's writ,¹² he entered an *Alford* plea to a second-
12 amended information charging him with second-degree murder only.¹³ Seven months later—before
13 sentencing and with the assistance of new counsel—Harlan moved to withdraw his plea.¹⁴ After an
14 evidentiary hearing, the state district court denied the motion and sentenced Harlan to 10–25 years in
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16 ⁴ *See id.*

17 ⁵ ECF Nos. 8-16, 8-17.

18 ⁶ ECF No. 8-18.

19 ⁷ ECF No. 8-20.

20 ⁸ ECF No. 8-21.

21 ⁹ ECF No. 9-1.

22 ¹⁰ ECF No. 9-2.

23 ¹¹ ECF No. 9-3.

24 ¹² Though the district-court judge denied the writ, he acknowledged that Harlan could not be
25 adjudicated guilty on both the battery and mayhem counts.

26 ¹³ ECF Nos. 10-13, 10-14.

27 ¹⁴ ECF No. 11-4.

1 prison.¹⁵

2 Harlan appealed his conviction, arguing that his guilty plea was involuntary and unknowing
3 and that the cumulative effect of the trial court's errors violated his due-process rights.¹⁶ The Nevada
4 Supreme Court affirmed the conviction, finding that Harlan's plea was constitutionally valid because
5 it was made knowingly, voluntarily, and intelligently. The Nevada Supreme Court declined to
6 address the merits of Harlan's cumulative-error claim because, under the United States Supreme
7 Court's decision in *Tollett v. Henderson*, Harlan had waived any claims for errors that occurred
8 before he entered his plea.¹⁷

9 **B. Harlan's state-court post-conviction proceedings**

10 Harlan then filed a pro se habeas petition in the state district court in which he claimed that
11 (1) the trial court erred by allowing the state to file an amended information, (2) his plea was not
12 intelligently entered, (3) the trial court was biased, and (4) his counsel was ineffective for failing to
13 investigate, concealing discovery, and failing to "follow up" on his habeas petition.¹⁸ The state
14 district court denied the petition.¹⁹ It found that Harlan's first claim was precluded by the law of the
15 case and NRS 34.810(1)(a).²⁰ It also rejected Harlan's claim that his plea was not intelligently
16 entered because it was belied by the record, and it rejected the ineffective-assistance (IAC) claims
17 because Harlan failed to show deficiency or prejudice.²¹ Finally, the court found that Harlan's bare

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19 ¹⁵ ECF No. 11-13.

20 ¹⁶ ECF No. 12-3.

21 ¹⁷ ECF No. 12-7 (citing *Tollett v. Henderson*, 411 U.S. 258 (1973); *Webb v. State*, 538 P.2d 164
22 (Nev. 1975)).

23 ¹⁸ ECF No. 12-9.

24 ¹⁹ ECF No. 12-19.

25 ²⁰ NEV. REV. STAT. § 34.810(1)(a) provides that the court must dismiss a petition if the petitioner's
26 conviction was based on a guilty plea and the petition "is not based upon an allegation that the plea
27 was involuntarily or knowingly entered or that the plea was entered without effective assistance of
counsel."

28 ²¹ ECF No. 12-19.

1 assertions of bias failed to state a claim and that his trial-court-bias claim was also precluded under
2 NRS 34.810(1)(a).

3 Harlan appealed, and the Nevada Supreme Court affirmed.²² The court found that Harlan's
4 first claim challenging the state's filing of the amended information was barred by NRS 34.810.²³
5 The court rejected Harlan's IAC claim. It found that Harlan's allegation that counsel failed to show
6 him the autopsy report was barred by the law of the case because the district court found at the
7 evidentiary hearing on his motion to withdraw the guilty plea that he had been shown the report and
8 discussed it with counsel.²⁴ The court also rejected Harlan's remaining IAC claims that his counsel
9 was ineffective for failing to investigate, concealing discovery, and failing to follow up on his habeas
10 petition, finding that he failed to show deficiency or prejudice.²⁵ Finally, the court denied Harlan's
11 trial-court-bias claim as both unsupported by the record and barred by NRS 34.810.²⁶

12 Harlan timely dispatched this federal petition in April 2015. He asserts four claims: (1) the
13 trial court erred by allowing the state to amend the information to include the first-degree murder and
14 robbery charges, (2) his guilty plea was invalid, (3) the district court improperly participated in his
15 plea negotiations, and (4) trial counsel was ineffective.

16 Discussion

17 A. Exhaustion under 28 U.S.C. § 2254

18 A federal habeas petitioner first must exhaust state-court remedies on a claim before
19 presenting that claim to the federal court.²⁷ The exhaustion requirement ensures that the state courts
20 will have the first opportunity to pass upon and correct alleged violations of federal constitutional
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22 ²² ECF No. 12-22.

23 ²³ ECF No. 12-22 at 2–3.

24 ²⁴ ECF No. 12-22 at 3–4.

25 ²⁵ *Id.* at 3–4.

26 ²⁶ *Id.* at 4–5.

27 ²⁷ 28 U.S.C. § 2254(b)(1)(A).

1 guarantees.²⁸ To satisfy the exhaustion requirement, a petitioner must fairly present his claims to the
 2 state's highest court.²⁹ Fair presentation requires that a petitioner (1) identify the federal legal basis
 3 for his claims and (2) state the facts entitling him to relief on those claims.³⁰ A petitioner must alert
 4 the state court to the fact that he is asserting a federal claim;³¹ mere similarity between a state-law
 5 claim and a federal-law claim is insufficient.³² "Submitting a new claim to the state's highest court
 6 in a procedural context in which its merits will not be considered absent special circumstances does
 7 not constitute fair presentation."³³

8 **B. Ground one is unexhausted**

9 In ground one, Harlan alleges that there was insufficient evidence to bind him over on the
 10 open-murder and robbery charges and that the trial-court judge improperly allowed the state to
 11 amend the information to add these charges. Harlan raised a similar claim to the Nevada Supreme
 12 Court on direct appeal and on appeal in his state collateral-review proceedings. But Harlan did not
 13 present these claims to the Nevada Supreme Court in a procedural context in which their merits
 14 would be considered. The Nevada Supreme Court rejected this claim twice without reaching its
 15 merits—first on direct appeal because Harlan waived the claim when he pleaded guilty and then on
 16 collateral review because its consideration was barred by NRS 34.810.³⁴ Accordingly, ground one
 17 is unexhausted.

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 19 ²⁸ See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

20 ²⁹ See e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Yang v. Nevada*, 329
 21 F.3d 1069, 1075 (9th Cir. 2003).

22 ³⁰ See *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000); *Castillo v. McFadden*, 399 F.3d 993,
 23 999 (9th Cir. 2005).

24 ³¹ *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995).

25 ³² See *Henry*, 513 U.S. at 366; see also *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

26 ³³ *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351
 27 (1989)).

28 ³⁴ *Id.* at 4–5.

1 **C. Ground two is partially unexhausted.**

2 In ground two, Harlan alleges that his guilty plea was not intelligently and knowingly entered
3 and that he received ineffective assistance of counsel. He alleges that his counsel was ineffective
4 because they would not allow him to see the autopsy report until after he pleaded guilty, his
5 relationship with counsel was volatile, and counsel promised him that, if he pleaded guilty, he would
6 receive a 25-year sentence.³⁵ He also alleges that the trial court erred by denying his motion to
7 withdraw his guilty plea.

8 Harlan did not exhaust his allegations about his “volatile” and “acrimonious” relationship
9 with counsel in state court. Harlan did exhaust his claim that his plea was not intelligently and
10 knowingly entered because his counsel failed to provide him with the autopsy report until after he
11 pleaded guilty.³⁶ Harlan also exhausted his allegation that counsel was ineffective for promising him
12 that he would receive only a 25-year sentence. But this claim fails on its merits because Harlan
13 cannot show deficiency or prejudice: he was, in fact, sentenced to 10–25 years in prison.³⁷ Finally,
14 Harlan also exhausted his claim that the trial court erred by denying his motion to withdraw his
15 guilty plea.³⁸

16 Accordingly, ground two is partially unexhausted and partially fails on the merits: Harlan’s
17 claims that (1) his trial counsel was ineffective for failing to provide him with the autopsy report
18 until after he pleaded guilty and (2) that the trial court erred by denying his motion to withdraw his
19 guilty plea are exhausted; Harlan’s IAC claim based on a volatile relationship with his attorneys is
20 unexhausted, and his IAC claim for being promised a particular sentence fails on its merits.

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25 ³⁵ ECF No. 5 at 7.

26 ³⁶ ECF Nos. 12-22 at 3–4; 12-7 at 2–4.

27 ³⁷ ECF No. 11-13.

28 ³⁸ ECF No. 12-7.

D. Ground three is partially unexhausted, and the exhausted portion is not cognizable on federal habeas review.

In ground three, Harlan alleges that the state district court judge flagrantly participated in plea negotiations and that both of his attorneys and the prosecutor convened in the district court's chambers for an off-record exchange after which he was promised a 10–25 year sentence, all in violation of his due-process rights and Rule 11 of the Federal Rules of Criminal Procedure.³⁹

Harlan did not raise any claim relating to the trial court's involvement with his plea negotiations on direct appeal.⁴⁰ Harlan raised a similar claim in his state habeas proceedings. There, he claimed that the trial-court judge was biased because he had improperly participated in plea negotiations.⁴¹ But in those proceedings, Harlan cited only Federal Rule of Criminal Procedure 11 as the basis for his claim; he did not allege any violations of his federal constitutional rights. Harlan's claim that the trial court improperly participated in plea negotiations in violation of his due-process rights is therefore unexhausted, and Rule 11 is not a federal constitutional guarantee, so it is not an appropriate basis for federal habeas relief.

E. Ground four is exhausted.

In ground four, Harlan alleges that trial counsel was ineffective for failing to conduct gun-shot-residue testing, concealing discovery, failing to produce findings made by the expert witness, and “failing to follow up on first Habeas Corpus denial.”⁴² Harlan raised these claims in his state habeas corpus proceedings,⁴³ so they are exhausted. But Harlan's claims that counsel was ineffective for failing to produce expert-witness reports and failing to represent him in state habeas corpus proceedings fail on their merits because they are purely conclusory. So I dismiss these claims with

³⁹ ECF No. 5 at 15–18.

⁴⁰ ECF No. 104.

⁴¹ ECF No. 12-9.

⁴² ECF No. 5 at 20–21.

⁴³ See ECF No. 12-9 at 18–20.

1 prejudice.

2 **E. Because this is a mixed petition, Harlan must advise the court how he wants to proceed.**

3 A federal court may not entertain a habeas petition unless the petitioner has exhausted all
4 available and adequate state-court remedies for *all claims* in the petition.⁴⁴ A “mixed” petition
5 containing both exhausted and unexhausted claims is subject to dismissal.⁴⁵ Because Harlan’s
6 petition is mixed, he has three options:

- 7 1. Submit a sworn declaration advising the court that he is voluntarily abandoning his
8 unexhausted claims and will proceed on the exhausted claims only;
- 9 2. Submit a sworn declaration advising the court that he will return to state court to
10 exhaust his unexhausted claims, in which case his federal habeas petition will be
11 denied without prejudice; or
- 12 3. File a motion asking the court to hold his exhausted claims in abeyance while he
13 returns to state court to exhaust his unexhausted claims.⁴⁶

14 As to the third option, Harlan is cautioned that a stay and abeyance is available only in
15 limited circumstances. If Harlan chooses to file a motion for stay and abeyance, he must show that
16 there was good cause for his failure to first exhaust these claims in state court and that these claims
17 are not plainly meritless.⁴⁷ Respondents would then have a chance to respond to his motion.

18 Regardless of which option Harlan chooses, he may not revive his claims that his counsel
19 was ineffective for promising him a particular sentence, failing to produce expert-witness reports,
20 and failing to represent him in state habeas proceedings or any of the allegations contained in ground

22 ⁴⁴ *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

23 ⁴⁵ *Id.*

24 ⁴⁶ *See Lundy*, 455 U.S. at 510; *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315 F.3d 1063
25 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

26 ⁴⁷ *Rhines*, 544 U.S. at 277 (stating that “stay and abeyance is only appropriate when the district court
27 determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.
28 [And] even if a petitioner [shows good cause], the district court would abuse its discretion if it were
to grant him a stay when his unexhausted claims are plainly meritless.”).

1 three because these claims fail on their merits.

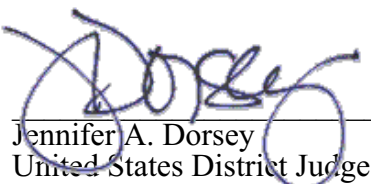
2 **If Harlan fails to choose one of these three options or seek other appropriate relief by**
3 **October 29, 2016, his federal habeas petition will be dismissed without prejudice as a mixed**
4 **petition.**

5 **Conclusion**

6 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that respondents'
7 motion to dismiss [ECF No. 7] is GRANTED in part and DENIED in part:

- 8 • **Harlan's claims that his counsel was ineffective for promising him a particular**
9 **sentence, failing to produce expert-witness reports, and failing to represent him**
10 **in state habeas proceedings, and all of ground three are DISMISSED with**
11 **prejudice;**
- 12 • **Harlan must notify the court how he wishes to proceed with this action on the**
13 **remaining grounds by October 29, 2016. If Harlan does not file notice with the**
14 **court by this date, this action will be dismissed without prejudice and without**
15 **further notice.**

16 Dated this 29th day of September, 2016

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18 Jennifer A. Dorsey
19 United States District Judge
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